IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 1334 of 1993

with

CRIMINAL APPEAL No 238 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE M.C.PATEL
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MUSABHAI HAJIBHAI SHAMA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 1334 of 1993
   MR JM BUDDHBHATTI for Appellant
   MR HL JANI, APP for Respondent No. 1
2. Criminal Appeal No. 238 of 1994
   MR HL JANI, APP for Appellant
   MR JM BUDDHBHATTI for Respondent No. 1

CORAM : MR.JUSTICE M.C.PATEL
and
MR.JUSTICE A.L.DAVE

Date of decision: 26/03/2002

COMMON ORAL JUDGEMENT

(Per : MR.JUSTICE A.L.DAVE)

1. These two Criminal Appeals arise out of a judgment and order rendered by Additional Sessions Judge, Rajkot in Sessions Case No.125 of 1972 on 18th October, 1993.

2. The present appellant in Criminal Appeal No.1334 of 1993 alongwith his wife Mariyamben and son Gulab were chargesheeted by the police for offence punishable under Sections 302, 342 and 452 of I.P.C. and came to be tried by the learned Additional Sessions Judge, Rajkot. The learned Additional Sessions Judge came to the conclusion that the prosecution could establish the charges against the appellant in Criminal Appeal No.1334 of 1993 but the evidence qua the respondents in Criminal Appeal No.238 of 1994 was doubtful and, therefore, benefit of doubt was given to those two accused persons and they came to be acquitted. Aggrieved by the conviction, original accused no.3 Musabhai Hajibhai Shama has preferred Criminal Appeal No.1334 of 1993 and aggrieved by the acquittal of the two accused Mariyamben and Gulab Musabhai, the State has preferred Criminal Appeal No.238 of 1994.

3. The facts of the case in brief are that the accused persons and one Janak Bhagwanji were known to each other and were staying near each other at Rukhadia Colony, Mafatiapara, Rajkot. There were some differences between the two groups. On 11th August, 1992, at about 10.30 a.m., when Lalitaben, wife of Janak Bhagwanji was at her home, she was set ablaze. She was rescued by the neighbours, was taken to the hospital and ultimately she succumbed to her injuries on 13th August, 1992. After she was taken to the hospital, her complaint was recorded wherein she implicated the accused persons. However, as per the prosecution case, while she was being taken to the hospital, she told her husband Janak Bhagwanji that she was assaulted upon by Musa, Gulab and Kathal. Another witness Nirmalaben Hirjibhai says that she was informed by the deceased that she was assaulted upon by Musa, Mariyam and Kathal. A dying declaration was recorded by witness Natwarlal M. Bhalodia where the deceased implicated the accused persons. Considering all these pieces of evidence, the investigating agency filed

chargesheet in the Court of Chief Judicial Magistrate, Rajkot who, after following the procedure, committed the case to the Court of Sessions at Rajkot.

4. Charge was framed against the accused persons at Exh.3. All the accused persons pleaded not guilty to the charge and claimed to be tried.

5. The learned Additional Sessions Judge came to the conclusion that the evidence qua original accused nos.1 and 2 was doubtful and benefit must go to them. He, therefore, by giving benefit of doubt, acquitted accused nos.1 and 2. The learned Additional Sessions Judge concluded that the evidence qua accused no.3 was trustworthy and he, therefore, convicted him for the offence punishable under Sections 302, 342 and 452 of I.P.C. and sentenced him to undergo imprisonment for life and to pay a fine of Rs.2,000/-, in default, to undergo R.I. for six months for offence punishable under Section 302 of I.P.C. The learned Additional Sessions Judge sentenced accused no.3 to undergo R.I. for six months and to pay a fine of Rs.500/- and, in default, to undergo imprisonment for one month for the offence punishable under Section 342 of I.P.C. and lastly the Additional Sessions Judge sentenced accused no.3 to R.I. for a period of one year and to pay a fine of Rs.1,000/and, in default, to undergo R.I. for three months. All the sentences were ordered to run concurrently and set-off was also ordered to be given for the sentence undergone during the trial.

6. Accused no.3 has preferred Criminal Appeal No.1334 of 1993 against conviction and the State has preferred Criminal Appeal No.238 of 1994 against acquittal. Since both the appeals arise out of the same judgment and order, they are heard together and are disposed of by this common judgment.

7. Learned Advocate Mr. Buddhbhatti appearing for the appellant in Criminal Appeal No.1334 of 1993 submitted that the learned Additional Sessions Judge ought to have given benefit of doubt to accused no.3 as well. If the dying declaration of the deceased made before Janak Bhagwanji and Nirmalaben Hirjibhai were not in consonance with her dying declaration before the Executive Magistrate, the possibility of implicating accused no.3 falsely cannot be ruled out. This aspect has been lost sight of by the learned Additional Sessions Judge. Mr. Buddhbhatti has drawn our attention to certain discrepancies in the nature of time of arrival at the hospital and giving of information. Mr. Buddhbhatti

submitted that the dying declaration before the Executive Magistrate could not have been relied upon for the reason that, as admitted by the Executive Magistrate, the doctor had not certified that the deceased was in a fit state of mind to give a dying declaration. He, therefore, urged that Criminal Appeal No.1334 of 1993 may be allowed.

8. As far as Criminal Appeal No.238 of 1994 is concerned, Mr. Buddhbhatti submitted that this is an appeal against acquittal preferred by the State and unless the State is able to show that the view taken by the Trial Court is improper and there could not have been any other conclusion but the guilt of the accused, this court may not interfere in the finding of the Trial Court. He submitted that the court below has considered the earlier dying declarations by the deceased where she implicates different persons at different stages and the benefit, therefore, should be given to accused nos.1 and 2. The learned Judge has rightly found that the evidence is not proved beyond the sheer of doubt and benefit has been given. This court may not interfere with that verdict.

9. Learned Additional PP Mr. Jani has opposed Criminal Appeal No.1334 of 1993 by submitting that all the dying declarations of the deceased consistently implicate accused no.3. No reasons are indicated to doubt the veracity of these dying declarations. On the point of the dying declaration before the Executive Magistrate, Mr. Jani has drawn attention of this court to an endorsement made by the doctor in the margin of the dying declaration to the effect that the patient was fully conscious and oriented. He submitted that the conviction is rightly recorded and court may not interfere with it.

10. So far as Criminal Appeal No.238 of 1994 is concerned, Mr. Jani submitted that although in the earlier dying declarations, there is a discrepancy in names but once the Trial Court has accepted the dying declaration before the Executive Magistrate, it ought to have convicted accused nos.1 and 2 also. There is no reason to doubt the dying declaration before the Executive Magistrate and, therefore, the court below committed an error in giving benefit of doubt to accused nos.1 and 2 on the basis of earlier dying declarations. Mr. Jani, therefore, submitted that this appeal may be allowed and acquittal may be set aside and the respondents may be convicted for the offence with which they were charged.

11. We have gone through the record and proceedings and have given a thoughtful consideration to the contentions raised before us.

12. So far as Criminal Appeal No.1334 of 1993 is concerned, we find no reason to interfere with the judgment and order impugned herein. P.W.2 Janak Bhagwanji (Exh.12), P.W.3 Nirmalaben Hirjibhai (Exh.13) and Siddhraj Badhaji (Exh.34) consistently say that in the oral dying declaration before them, the deceased had implicated the appellant Musa, accused no.3. The dying declaration before the Executive Magistrate (Exh.43) and deposition of the Executive Magistrate Natwarlal Bhalodia (Exh.41), if read together, clearly implicate accused no.3. The complaint (Exh.51) is also consistent with this evidence. Mr. Buddhbhatti could not assail the finding of the Trial Court on any count. So far as conviction of accused no.3 is concerned, the discrepancies indicated by him are minor and insignificant. So far as dying declaration is concerned, it was recorded in presence of doctor Vrajlal Pasani (Exh.44) and he has certified that the patient was fully conscious and oriented. That certificate is found in the margin of the dying declaration (Exh.43) and, in our view, there is no scope for any interference in the verdict of conviction so far as accused no.3, appellant in Criminal Appeal No.1334 of 1993 is concerned. We are, therefore, of the opinion that the appeal deserves to be dismissed.

13. So far as Criminal Appeal No.238 of 1994 is concerned, it is preferred by the State of Gujarat against acquittal. It is settled proposition of law that ordinarily, Appellate Court will not interfere in a verdict of acquittal unless it is shown that the view taken by the court below is perverse and palpably illegal.

14. We have gone through the judgment impugned herein. We find that the learned Additional Sessions Judge was impressed by the fact that the deceased in her oral dying declarations, had given different versions. In her dying declaration before Janak Bhagwanji, she implicated Gulab and Kathal besides Musa whereas in her oral dying declaration before Nirmalaben Hirjibhai, she implicated Mariyam and Kathal, besides Musa. Mariyam and Gulab are the respondents in this appeal. The learned Judge, therefore, found that she is not consistent about involvement of Gulab and Mariyam and, therefore, gave benefit of doubt to these two accused persons. It must be noted that Kathal has not been chargesheeted. In our

opinion, considering the facts of the case, it cannot be said that the view taken by the learned Additional Sessions Judge is perverse or palpably illegal. We do not think that this is a fit case where this court should interfere in an order of acquittal. The appeal, therefore, deserves to be dismissed.

15. For the foregoing reasons, neither of the two appeals merit for any interference in the order impugned. Both must fail and are, therefore, dismissed.

(M.C. Patel, J.)

(A.L. Dave, J.)

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